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Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

BOSTON & MAINE RAILROAD,
Petitioner,

v.

ARLENE M. HALL, EXECUTRIX,
Respondent.

No.

SAME *v.* SAME.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The Boston & Maine Railroad, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on November 21, 1960.

Citations to Opinions Below.

The findings of fact, conclusions of law, opinion and judgment of the District Court of Massachusetts (R. 92-97) are unreported and are printed in Appendices C and D attached hereto. The opinion of the Court of Appeals

(R. 103-108) is reported in F. 2d , and is printed in Appendix B attached hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 21, 1960 (R. 109-110). The jurisdiction of this Court is invoked under U.S. Code, Title 28, sec. 1254 (1).

Question Presented.

Whether the Court of Appeals has correctly interpreted the decisions of this Court in cases arising under the Federal Employers' Liability Act (U.S. Code, Title 45, sec. 51 *et seq.*) as establishing that liability to an employee for death in a collision at a private grade crossing may be predicated solely upon a finding of negligence based on a failure to have an automatic signal device to apprise the private crossing tender of the approach of a train.

Statute Involved.

The statutory provision involved is U.S. Code, Title 45, sec. 51. The pertinent provisions of this statute are printed in Appendix A attached hereto.

Statement.

The respondent's testate, an operating fireman employed by the petitioner (R. 15), on October 28, 1958, was acting as engineer of a train of the petitioner (R. 40) when it was in collision with a truck (R. 45) on a private grade crossing on the main line in Woburn, Massachusetts (R.

40). The truck was waved onto the track by a crossing tender (R. 22), who was employed by the corporation (R. 15) for whose benefit the petitioner had established the private grade crossing in accordance with the terms of the agreement between the petitioner and the corporation (R. 89-91). On the day of the collision the crossing tender opened the gates guarding the tracks in belief that petitioner's train was not yet due (R. 26-27). The crossing tender was supplied with petitioner's schedule of use of the crossing (R. 26). There was no automatic signal to inform the tender of the approach of petitioner's train (R. 26) and it was stipulated at trial that it was possible to install automatic devices which would warn of the approach of the train (R. 67).

At the close of the evidence the petitioner presented a motion for a directed verdict, which was denied by the Court (R. 73-74), and thereafter the jury returned a verdict in favor of the respondent on February 10, 1960 (R. 85). Judgment was entered on this verdict on February 11, 1960 (R. 97). While the action between the petitioner and the respondent was being tried to the jury, petitioner's third party action against Stauffer Chemical Company, based upon an indemnity agreement (R. 91) which was contained in the contract which established the private grade crossing was, by agreement, tried to the Court (R. 14). At the same time that judgment was entered against the petitioner on the jury verdict, the Court filed its findings of fact, conclusions of law and opinion in the non-jury action (R. 92-97) and provided in the judgment that petitioner was entitled to indemnification from Stauffer Chemical Company as to any amount paid by it on the judgment entered in favor of respondent against petitioner (R. 97).

In submitting the action by respondent against petitioner to the jury, the Court required that certain special

questions be answered by the jury if it should find for the plaintiff on the general verdict. These questions, together with the answers of the jury, were:

1. "Was one of the causes of Hall's [respondent's testate's] death the failure of plant manager Forbes [the crossing tender employed by Stauffer Chemical Company] to exercise due care toward Fireman Hall?" The jury answered: "Yes."

2. "Was one of the causes of Hall's death the negligent failure of the railroad to have electrical devices for sounding a bell or flashing a light or lowering gates at the Stauffer crossing?" The jury answered: "Yes."

3. "Was one of the causes of Hall's death the negligent failure of the railroad to have appropriate rules for the engineer?" The jury answered: "No" (R. 85).

Petitioner filed separate notices of appeal from the denial of its motion for a directed verdict and from the judgment entered against it (R. 98). The Court of Appeals in its opinion expressly stated that it was not necessary to decide the issue raised by the respondent as to the application of the doctrine of *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U.S. 326, to the conduct of the crossing tender employed by Stauffer Chemical Company (R. 105) since it ruled that reliance upon a gate tender was not sufficient and that it could not rule that the jury's finding that the petitioner was negligent in not having electrical devices at this crossing was unsupportable (R. 106).

Reasons for Granting the Writ.

The Court of Appeals in deciding the case has misconstrued and misapplied applicable principles of law as to the duty of a railroad in the protection of private grade crossings.

Specifically, the Court below premised its decision upon the ruling that the jury would be warranted in finding the petitioner negligent in the performance of its duty toward its employees where the petitioner failed to install automatic warning devices even though the petitioner had, by contract, provided for gates and a crossing tender to guard the private grade crossing. Petitioner submits that this ruling imposes upon petitioner the burden of insuring the safety of its employees at grade crossings.

Bearing in mind that the possible application of the *Sinkler* doctrine to the activities of the gate tender was passed over, the Court of Appeals predicated its ruling as to the right of the jury to find petitioner negligent upon the following reasoning:

While the petitioner caused gates to be installed *and* required a gate tender to be present whenever the crossing was to be used *and* supplied the gate tender with a schedule of the time of passage of petitioner's trains, nevertheless the petitioner could be found to be negligent because of its failure to install automatic devices to warn the gatekeeper. The following words were used by the Court of Appeals: "We cannot rule as a matter of law that reliance upon an unprompted gate tender was sufficient and the jury's [finding of negligence on the absence of automatic devices] was unsupportable" (R. 106). It may be demonstrated that this ruling makes petitioner an insurer, since it requires that the petitioner take every precaution available to see to the safety of its employees, rather than requiring that the petitioner do what is reasonable in the circumstances to see to the safety of its employees.

The law of the Commonwealth of Massachusetts, which governs the operation of petitioner's trains at crossings within the state, does not require that a railroad do all in its power to protect crossings, whether private or public. All that is required is that the railroad comply with

the statutory requirements as to signs and bells. Mass. G.L. (Ter. Ed.) c. 160, secs. 138, 140, 141. The Supreme Judicial Court of Massachusetts, in an action resulting from a collision at a crossing where a ledge of rock blocked view of the track, said in *Hubbard* v. *Boston & Albany Railroad Co.*, 162 Mass. 132, at 135: "The jury were permitted to find that the defendant was negligent in not taking other precautions than sounding the whistle and ringing the bell to warn travellers of the approach of trains. It is well settled in this Commonwealth that the requirements of the Pub. Sts. c. 112, §§ 163, 164 [now G.L. (Ter. Ed.) c. 160, §§ 138 and 140 respectively], in regard to the erection of signboards and the sounding of the whistle and the ringing of the bell of locomotive engines at crossings, are not exclusive of other provisions for the protection of the public where these are not sufficient to provide reasonably for their safety, and that it is the duty of a railroad corporation *to erect gates or station a flagman* at a crossing if the security of the public reasonably requires it . . ." (Emphasis added.) The same principle of the common law has been applied in *Interstate Motor Lines* v. *Great Western Ry. Co.* (C.C.A. 10 Cir.), 161 F. 2d 968, 972, and *Bailey* v. *Baltimore & Ohio Railroad Co.* (C.A. 2 Cir.), 227 F. 2d 344, 347. In *Gibson, Adm'r*, v. *Venne*, 2 Ill. App. 2d 158, 162-163, 118 N.E. 2d 788, 790, in discussing a crossing which was ordinarily non-hazardous, it was said: "Under the circumstances, if there was no extra-hazardous condition existing at the crossing there would be no duty upon the railroad *to operate safety devices or provide a watchman.* If there was any evidence tending to show that an extra-hazardous condition existed at the crossing it was for the jury to determine whether the railroad should have provided additional warning to travellers upon the highway." (Emphasis added.)

The case at bar is strikingly analogous to the facts of *Inman* v. *Baltimore & Ohio Railroad Co.*, 361 U.S. 138, where, at page 140, it was said: "The [Federal Employers' Liability] Act does not make the employer an insurer." In the *Inman* case the injured employee was a railroad crossing watchman at a public crossing who was injured when struck by a drunken driver. The rationale of the opinion is that, if the railroad does all that is reasonable to protect its employee, a jury will not be permitted to find that the railroad was negligent for failing to do all that might have been done to make the place of work as safe as one's living room.

Thus the petitioner submits that the Court of Appeals erroneously construed the decisions of this Court in holding that a verdict for a plaintiff in an action under the Act may be sustained if it can be said that the defendant railroad did not do all that it might have done to insure the safety of its employees.

The petitioner submits that the error committed by the Court of Appeals is on a matter of basic importance to the proper administration of the Act and could have far-reaching effect on parties litigant in Federal Employers' Liability Act cases. Many of the considerations which have persuaded this Court to grant certiorari in Federal Employers' Liability Act cases where the petitioner is the plaintiff-employee are also present in cases where the defendant-carrier is the party seeking certiorari. The zealousness of the Court to effectuate the intention of the Congress to secure the right to a jury determination where the right has been improperly denied should be matched with an equal concern on its part to safeguard all of the historical incidents of a jury trial, including the duty of the trial judge of determining whether the evidence in its entirety would rationally support a verdict for the plain-

tiff, assuming the jury took a view of the evidence most favorable to the plaintiff.

While petitioner directs the thrust of its argument in this petition to the alleged error of the Court of Appeals in sustaining the verdict for the respondent on the failure of the petitioner to have automatic devices, petitioner urges that the Court of Appeals should have ruled that the verdict could not stand on that basis nor on an application of the doctrine of the *Sinkler* case to the facts before the Court of Appeals. In *Sinkler* it was ruled that an injury caused by an act of an independent contractor could be found to be the basis for liability of the carrier to the injured employee where the independent contractor was performing "operational activities" for the carrier. The acts of the gate keeper employed by the Stauffer Chemical Company were not "operational activities" performed for the petitioner. Where this Court has had occasion to consider the application of the *Sinkler* doctrine it has ruled that the maintenance of a side track by a third party, for whose benefit the side track was established, was not an operational activity of the railroad which operated over the side track. *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396, 397-398. If maintenance of tracks over which a carrier operates trains is not an operational activity, how, then, could it be ruled that the guarding of a private grade crossing is an operational activity when the carrier is under no legal duty to provide protection (other than warning signs) at private grade crossings in the state where the crossing in issue existed. Mass. G.L. (Ter. Ed.) c. 160, secs. 140, 141.

The petitioner submits that on the facts of this case there was no substantial evidence, or even a scintilla of evidence, from which a reasonable jury could find that negligence on the part of the petitioner caused or directly contributed in any degree to cause the death of the testate

of the plaintiff below. Consequently the Court of Appeals clearly erred in deciding the case.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES R. DEGIACOMO,
Counsel for Petitioner.

Boston, Massachusetts.

Appendix A.

UNITED STATES CODE (1958 Edition).

Title 45, Sec. 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the neg-

ligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Appendix B.

OPINION OF COURT OF APPEALS FOR THE FIRST CIRCUIT IN BOSTON & MAINE RAILROAD, DEFENDANT, THIRD PARTY PLAINTIFF, APPELLANT, v. ARLENE M. HALL, PLAINTIFF, APPELLEE, AND STAUFFER CHEMICAL COMPANY, THIRD PARTY DEFENDANT, APPELLANT, v. BOSTON & MAINE RAILROAD ET AL., APPELLEES.

(Heard October 5, 1960; Decided November 21, 1960.)

Before Woodbury, Ch. J., and Hartigan and Aldrich, Cir. JJ.

ALDRICH, *Circuit Judge*. On the morning of October 28, 1958, the plaintiff's testate, Hall, was a fireman on duty in the cab of a train operated by the defendant, Boston & Maine Railroad. He was killed when the train collided with a truck at a private grade crossing on the main line in Woburn, Massachusetts. This crossing was for the sole use of the third-party defendant, Stauffer Chemical Company, whose factory was on the opposite side of the track from a

highway. By written agreement between Stauffer and the railroad the crossing gates were to be kept lowered at all times except when temporarily raised by Stauffer's employees to permit passage of vehicles. On the day in question Stauffer's gatekeeper, Forbes, possibly misled by a late blowing of Stauffer's 8 o'clock whistle, opened the gates and admitted a truck just before the train was due.[1] The air was foggy, impairing visibility. There was no automatic signal notifying Forbes that the train was coming, and he had no warning other than the timetable which, because of his mistake as to the time, was ineffective. The train arrived before the truck had completed its crossing. The then unavoidable collision killed Hall.

A finding by the jury that Forbes was negligent was unquestionably warranted on this evidence. Hall's executrix, however, did not sue Stauffer, but sued the railroad under the Federal Employers' Liability Act, 45 U.S.C. 51. Her first contention is that Forbes, although not an employee of the railroad, was its agent under the doctrine of *Sinkler* v. *Missouri Pacific R.R.*, 1958, 356 U.S. 326, so that his negligence was to be attributed to the railroad. The court charged the jury that it might so find. We do not believe it necessary to decide this matter in view of the plaintiff's second contention. This was that the railroad was itself negligent in not providing for an automatic signal which would warn Stauffer's gatekeeper of the arrival of trains. It was stipu-

[1] Forbes testified that he opened the gates shortly after the whistle, which, according to him, made it no later than 8:02. The train was due at 8:06, and the engineer testified it was on schedule. In view of the fact that we find the railroad negligent in another particular it is not necessary to decide whether Forbes' recollection of how soon he acted after a whistle which "customarily" blew at a certain hour would warrant a jury in finding the train ahead of time, and hence possibly negligent. We will assume that it was on schedule. In the railroad's cross action against Stauffer, tried without jury, the court expressly so found.

lated that such a signal could have been provided, and, of course, it is common knowledge that such signals exist at grade crossings maintained for the use of the public. The purpose in each instance must be precisely the same —to warn the gatekeeper of the approach of trains. While there may be a difference with respect to gates which are kept raised except when a train is to pass, and the reverse, nevertheless, the difference is one of degree. If it is desirable to advise the railroad's own employee at a public crossing, it seems difficult to say that in no case can there be need of advising a gatekeeper at a private crossing. It may be, as the railroad suggests, that some private crossings have no gates at all. However, each crossing must be regarded on its own special facts. This one was traversed by 30 to 100 trucks each day. The particular truck in question was 45 feet long, and grossed 30 tons. Some ten of this type crossed daily. Thirty trains pass daily. Although the track was straight for some distance, in the event of fog, as in this case, a train could not be seen until it was near the crossing. Hence there would be no visual warning.[2] We cannot rule as a matter of law that reliance upon an unprompted gate tender was sufficient and that the jury's affirmative answer to a special question, whether "one of the causes of Hall's death [was] the negligent failure of the railroad to have electrical devices . . . at the Stauffer crossing," was unsupportable. *Cf. Tiller* v.

[2] The truck driver testified that visibility was only 20-25 feet. We would take judicial notice that this is incredible. However, the witness most favorable to the railroad said 900 feet. It was estimated that the truck was proceeding at 2 miles an hour. Since the truck was 45 feet long, and a train is about 8 feet wide, the truck would be in its part for about 18 seconds. The train was traveling 59 miles an hour. Consequently, the truck could readily have been struck by a train that was not visible when the truck entered the track area, for in 18 seconds the train would travel some 1500 feet.

Atlantic Coast Line R.R., 1943, 318 U.S. 54. The railroad's motion for a directed verdict was properly denied.

We turn to the cross action of the railroad against Stauffer on its written contract of indemnity. This agreement stated in part, "[The] crossing shall [not] be used . . . when any train is known to be due. . . . [Stauffer] will indemnify . . . [the] railroad . . . against any and all loss [or] . . . damage . . . and against any and all claims or suits for . . . death, by [Stauffer] or by any person authorized hereunder to pass and repass thereby or in any way attributable to the failure of [Stauffer] to perform this agreement or to the negligence of any crossing tender in charge of said crossing and in its employ . . . when such claims or suits arise out of or are in any way referable to the existence or use of said crossing.". Referring to this portion of the contract the court said, "This is a specific agreement between Stauffer and the railroad that no matter how many blameworthy causes of Hall's death may exist, if one of the causes is the negligence of Stauffer's crossing-tender then Stauffer will indemnify the railroad. There could hardly be drawn an indemnification agreement more clearly applicable to the case at bar.' As a result the court ordered judgment against Stauffer in favor of the railroad for the amount of the jdgment enfered in favor of the original plaintiff on the verdict. Stauffer appeals.

Stauffer contends at the outset that the indemnity agreement should be governed by the law of Massachusetts, and not by federal law. We will so assume as, if there is any difference, the Massachusetts law appears the more favorable to Stauffer. The Massachusetts court is one that denies contribution between joint tortfeasors. *Old Colony St. Ry.* v. *Brockton & Plymouth St. Ry.*, 1914, 218 Mass. 84, 88; *Burke* v. *Hodge*, 1912, 211 Mass. 156, 164. This principle appears to have colored its views with respect

to indemnity agreements. See *Churchill* v. *Holt*, 1881, 131 Mass. 67. While such a provision is not against public policy, an agreement, as a matter of construction, will not be interpreted to provide for indemnification when the indemnitee's own negligence contributed to the loss "unless its express language requires it. Such an intent must unequivocally appear, and words of general import are not enough." *Boston & Maine RR.* v. *T. Stuart & Son Co.*, 1920, 236 Mass. 98, 104. See *Farrell* v. *Eastern Bridge & Structural Co.*, 1935, 291 Mass. 323.

We question whether this agreement unequivocally provided for indemnification no matter what negligence of the railroad contributed to the loss. We might doubt whether, for example, if the train had been ahead of schedule, and this had been found to be negligence contributing to Stauffer's improvident exercise of its easement, the agreement would have been operative. But that is not the question. The only fault we have determined by the railroad was the failure to maintain a warning signal.[3]

[3] As we have previously stated, it was contended that under *Sinkler* v. *Missouri Pacific R.R.*, 1958, 356 U.S. 326, Forbes was an "agent" of the railroad. Hence it has been suggested that the railroad, as principal, was jointly liable with Stauffer, and that the parties were joint tortfeasors *in pari delicto*. The use by a licensee of a private easement of crossing (the raising of gates otherwise closed and protecting the crossing seems merely an incident of such use) was not in furtherance of any railroad business, and appears far removed from the direct operational assistance the railroad received from the switcher in *Sinkler*. However, even if it be assumed that in some respect the railroad was responsible for Forbes, the Massachusetts court has not applied the doctrine of *in pari delicto* to all forms of dual liability. Cf. *Old Colony R.R.* v. *Slavens*, 1889, 148 Mass. 363; *Lowell* v. *Boston & Lowell R.R.*, 1838, 23 Pick. 24. See *Nickerson* v. *Wheeler*, 1875, 116 Mass. 295, 298. And in any event, we think the reasoning hereafter expressed in the body of the opinion would apply equally to this claimed "agency" ground.

A contract must be construed in the light of the circumstances under which it was made. Stauffer knew that the railroad was delegating responsibility to it in the circumstance of there being no signal, and accepted liability for negligence of its gatekeeper under those conditions. It cannot now say that the agreement is inapplicable to this loss because there was no signal, whether, as regards third parties, such absence was a fault or not. Any other construction would set the agreement at nought. The Massachusetts rule as to the scope of indemnity agreements is one of construction, not of law. It does not, in our opinion, overtride the primary rule of interpretation: "Every instrument in writing is to be interpreted, with a view to the material circumstances of the parties at the time of the execution, in the light of the pertinent facts within their knowledge and in such manner as to give effect to the main end designed to be accomplished. . . . [The] instrument is to be so construed as to give effect to the intent of the . . . [parties] as manifested by the words used illumined by all the attendant factors, unless inconsistent with some positive rule of law or repugnant to other terms of the instrument. An omission to express an intention cannot be supplied by conjecture. But if the instrument as a whole produces a conviction that a particular result was fixedly desired although not expressed by formal words, that defect may be supplied by implication and the underlying intention . . . may be effectuated, provided it is sufficiently declared by the entire instrument." *Dittemore* v. *Dickey*, 1924, 249 Mass. 95, 104-105, quoted in *Spaulding* v. *Morse*, 1947, 322 Mass. 149, at 152-153.

Affirmed.

Appendix C.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, WYZANSKI, J., IN BOSTON & MAINE RAILROAD, THIRD PARTY PLAINTIFF, V. STAUFFER CHEMICAL COMPANY, THIRD PARTY DEFENDANT, DATED FEBRUARY 11, 1960.

WYZANSKI, D. J.

Hall was killed in a grade crossing collision on October 28, 1958. He being an employee of the B. & M Railroad his executrix brought in this Court an FELA action against the railroad, and claimed a jury trial. The railroad then filed a third-party complaint against Consolidated Chemical Industries, Inc., for which Stauffer Chemical Company was later substituted as third-party defendant. In this third-party action, a jury was waived.

This Court finds that these are the governing facts with respect to the third-party action.

At the Stauffer plant in South Wilmington, or as it is more accurately called Woburn, there is a grade crossing. On one side of the crossing is a parking lot. Then there is a gate operated manually by a crank. Beyond the gate are three sets of rails—one for a siding, a second for South-bound traffic, and a third for North-bound traffic. On the other side of the North-bound traffic rail there is a divided gate, also manually operated. Beyond is the Stauffer plant.

The two gates are kept lowered all night. In the day Forbes is the gate keeper and crossing-tender. Forbes is the Stauffer plant manager and is not an employee of the railroad. The railroad gave orally its schedule to Forbes. From that schedule he knew that there was due from the South a North-bound train at 8:06 every morning. Customarily Forbes came to the plant about 8 A.M., raised the two gates, allowed some trucks to cross the tracks, and then lowered the gates so that the 8:06 could pass.

On October 28, 1958 Forbes arrived at the parking lot at 8 A.M. Despite his own estimate of time, but relying on the basis of the activities Forbes testified he had performed after 8 A.M., I find that it was about 8:05 before he had raised both gates on October 28. Forbes looked down the track in a Southerly direction. A morning fog made objects more than 400 feet away invisible. Forbes saw no train. He heard no train horn; but he was aware that about half the time trains did not sound a horn as they approached the crossing. Forbes waved to a tractor-trailer driven by Rollinson to cross the track. And Rollinson started to cross.

Meanwhile, the B. & M. Budd train left Boston at 7:50 A.M. Engineer O'Brien was in charge. Under his direction fireman Hall was driving the train. It passed Montvale, two miles from the Stauffer crossing, at 8:03 A.M. O'Brien told Hall to sound the horn. It is doubtful if Hall did so, since no one at the crossing testified he heard it. As the train was about 400 feet from the crossing O'Brien saw that the Westerly gate was raised. Almost simultaneously O'Brien saw the truck. He shouted to Hall to leave the cab. Both men left for the car behind the engine. Then the train ploughed through the trailer part of the tractor-trailer. The collision caused the almost immediate death of Hall.

In her FELA complaint against the railroad, Mrs. Hall, the decedent's representative, alleged that Hall's death was "due to the defendant, its *agents*, servants, or employees" and to "defendant's negligence in providing an unsafe place to work for the plaintiff's decedent." In my charge to the jury I instructed them that they could find the railroad negligent if they found that Stauffer was performing for the railroad operational functions and that in performing them Stauffer's plant manager Forbes failed to exercise due care to Hall. [Cf. *Sinkler* v. *Mo. Pac. R.*, 356 U. S. 326]. Also I instructed the jury that they could

find the railroad negligent if they found that a reasonable and prudent railroad would have had at the Stauffer crossing electrical equipment to give signals or to close the gates.

The FELA jury returned a general verdict for Mrs. Hall in the amount of $50,000. Responding to special questions which were covered by my charge and were considered by the jury simultaneously with their general verdict, the jury gave affirmative answers to each of the two following questions. "1. Was one of the causes of Hall's death the failure of plant manager Forbes to exercise due care toward fireman Hall? 2. Was one of the causes of Hall's death the negligent failure of the railroad to have electrical devices for sounding a bell or flashing a light or lowering gates at the Stauffer crossing?" Upon that verdict I am entering a judgment of $50,000 plus costs for Mrs. Hall against the railroad. I also specifically adopt the jury's verdict and answers.

The railroad now seeks to be indemnified by Stauffer in accordance with a contract of October 18, 1928 made by the railroad with a predecessor of Stauffer Chemical Company. The parties have agreed that Stauffer stands precisely in the shoes of its predecessor which made the contract with the railroad. Under that contract the railroad gave to Stauffer's predecessor a crossing easement available to Stauffer and those who came as invitees or licensees to Stauffer's premises. Stauffer agreed that the crossing shall "not" be used "when any train is known to be due," and Stauffer agreed in paragraph (d) that it would "indemnify" the railroad "against any and all loss [or] . . . damage, and against any and all claims or suits for . . . death, by [Stauffer] or by any person authorized hereunder to pass and repass thereby or in any way attributable to the failure of [Stauffer] . . . to perform this agreement or to the negligence of any crossing-tender

in charge of said crossing and in its employ . . . when such claims or suits arise out of or are in any way referable to the existence or use of the crossing."

This contract was made in Massachusetts by parties having places of business in Massachusetts and with respect to possible claims most of which were likely to be made in Massachusetts. If the law of any state is to be applied, Massachusetts law would be the most appropriate state law. It could be argued that insofar as the contract applies to the right of the railroad to be indemnified by Stauffer for damages which the railroad is required by the FELA to pay railroad employees, the contract is governed by federal law. But this argument goes beyond any decided case. And in the absence of any indication that the federal law would differ from the law of Massachusetts the point need not now be resolved.

Whether Massachusetts law or federal law be applied, it is indisputable that in this 1923 contract Stauffer is bound to "indemnify" the railroad "against . . . all damage . . . or . . . claims or suits for . . . death . . . in any way attributable to the failure of [Stauffer] . . . to perform this agreement or to the negligence of any crossing-tender in charge of said crossing and in its [Stauffer's] employ . . . when such claims or suits arise out of or are in any way referable to the existence or use of said crossing."

This is a specific agreement between Stauffer and the railroad that no matter how many blameworthy causes of Hall's death may exist, if one of the causes is the negligence of Stauffer's crossing-tender then Stauffer will indemnify the railroad. There could hardly be drawn an indemnification agreement more clearly applicable to the case at bar. I need not review in detail the various distinguishable cases discussed in the arguments before me. Those were cases where either the indemnification language was vague, or all the negligent persons were employees of

the indemnitee, or the damage was the consequence of the negligence of the indemnitor followed by (or less important than) the negligence of the indemnitee. Here Stauffer's own employee, Forbes, took affirmative action which involved a lack of due care to plaintiff's decedent. That was the last event in the chain of causation. Most important, Stauffer had expressly agreed to indemnify the railroad with respect to any claim, (not only a claim of a person passing over the crossing as a Stauffer invitee or licensee,) which was *in any way* attributable to the negligence of Stauffer's crossing-tender. And there is no public policy against the enforcement of such an express agreement. Nor can there be any doubt that as between the grantee, Stauffer, and the Boston & Maine railroad, Forbes, the crossing-tender, was Stauffer employee, selected by it, and under its direction and control. Hence it is of no avail to the grantee that as between the FELA plaintiff, Mrs. Hall, and the B & M Railroad, Forbes was also an "agent" of the railroad under the doctrine of the *Sinkler* case governing FELA actions.

Judgment for plaintiff.

United States District Judge

Appendix D.

JUDGMENT ENTERED FEBRUARY 11, 1960, BY WYZANSKI, J., IN ARLENE M. HALL, EXECUTRIX, V. BOSTON & MAINE RAILROAD AND BOSTON & MAINE RAILROAD, THIRD PARTY PLAINTIFF, V. STAUFFER CHEMICAL COMPANY, THIRD PARTY DEFENDANT.

WYZANSKI, *D. J.*

This case having come on for trial before the Court and jury, and a jury claim having been made with respect to

the action of Arlene M. Hall, Executrix, against Boston & Maine Railroad, and a jury having been waived in the third party action of Boston & Maine Railroad against Stauffer Chemical Company, and the two aspects of the case having been consolidated for trial, and the evidence having been offered by the parties, and the arguments having been had, and the jury having returned on February 10, 1960 both a general verdict and answers to special questions, and the Court having filed together with this judgment its findings of fact, conclusions of law, and opinion, now therefore it is

ORDERED, ADJUDGED AND DECREED

1. In accordance with the verdict of the jury, Arlene M. Hall, Executrix, shall recover from Boston & Maine Railroad $50,000 and her costs taxed at $

2. In accordance with the Court's findings of fact, conclusions of law, and opinion, Boston & Maine Railroad shall recover from Stauffer Chemical Company such part and only such part of the sum of $50,000 and costs referred to in Paragraph 1 as Boston & Maine Railroad shall show by competent evidence that it has paid or may hereafter pay on account of the recovery of plaintiff Arlene M. Hall, Executrix.

By the Court

Deputy Clerk

United States District Judge

ILE COPY

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FILED
JAN 26 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 632.

BOSTON & MAINE RAILROAD,
Petitioner,

v.

ARLENE M. HALL, EXECUTRIX,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The respondent adopts the statement of the petitioner appearing on pages 2 and 3 of its Petition for a Writ of Certiorari except so far as it is in conflict with or omits to include the following additional facts:

The time of the accident according to Forbes, the crossing-tender, was 8.02 a.m., and according to Rollinson, the truck driver, was 8.03 or 8.04 a.m., and according to O'Brien, the engineer of the train, a few seconds after 8.05 a.m. (R. 26, 51, 52, 57).

Because of the fog the visibility was restricted. Forbes could see approximately 300 feet, O'Brien approximately 800 feet, and Rollinson only 20 to 25 feet. Normally, when the weather is not foggy, one could see about 1 mile in a southerly direction along the tracks of the Boston & Maine Railroad (R. 22).

Neither Forbes nor Rollinson heard any sound of the horn on the approaching train (R. 27, 58).

The crossing is in use from 8 a.m. to 5 p.m., except for lunch between 12 and 12.30 p.m. Generally 30 to 100 trucks would pass over the crossing between 8 a.m. and 5 p.m. and approximately 10 would be trailer trucks of the type involved in this accident (R. 25). The truck and contents involved in the collision weighed approximately 60,000 pounds (R. 22).

Forbes had been employed at the Stauffer Chemical Company for at least a year prior to the accident. From his experience no train ever arrived at the crossing before its scheduled arrival time, but he had often seen trains arrive on time or as much as three quarters of an hour late (R. 27).

Although there was no railroad rule requiring a whistle or horn to be sounded on a train approaching this crossing, O'Brien said he always gave a "toot on the horn or whistle" (R. 47).

The average number of trains that passed over the crossing on October 28, 1958, was 31 per day (R. 68-69).

Reasons why Certiorari should be Denied.

Petitioner claims that the Court of Appeals misconstrued and misapplied applicable principles of law as to the duty of a railroad in the protection of private grade crossings.

In the first place, Federal law and not the law of the Commonwealth of Massachusetts applies to a case arising under the Federal Employer's Liability Act as to whether the evidence warrants a finding that the petitioner was negligent.

Sinkler v. *Missouri Pacific Railroad Co.*, 356 U.S. 326.

In the second place, Mass. G.L. (Ter. Ed.) c. 160, §§ 138 (as amended), 140 and 141, apply only to public ways and certain travelled ways, and not to private crossings. Furthermore, this statute was designed to afford protection from injury to travellers upon highways at railroad grade crossings rather than to railroad employees engaged in interstate commerce.

Sullivan v. *Hastis*, 237 Mass. 441.

The petitioner next cites the case of *Inman* v. *Baltimore & Ohio Railroad Co.*, 361 U.S. 138, as being analogous to the instant case. The respondent fails to see any resemblance whatsoever.

In the *Inman* case a crossing-flagman was hit by an intoxicated motorist who drove around a line of cars waiting for a train to pass. There was little if anything that the railroad failed to do—the regular crossing warning lights, bells, etc., were properly working; the flagman was waving a lantern; there was no claim that the crossing was dark. This court felt that the proximate cause of the accident was the conduct of the intoxicated motorist.

On the other hand, what did petitioner provide respondent's testate? It provided him with a dangerous crossing protected on a foggy day by a timetable. Under the circumstances that is the only assistance the crossing-tender had in protecting the crossing.

It is therefore quite obvious that the facts in the *Inman* case and those in the case at bar are quite different.

A case which was permitted to go to the jury, but nevertheless was much weaker on the facts than the case at bar, is *Robinson* v. *Gulf, Colorado & Santa Fe Railway Co.*, 325 S.W. 2d 432; cert. den. 362 U.S. 919.

In addition to the petitioner's failure to provide the crossing-tender with some electrical device to warn him

of the train's approach (it was agreed that such a device could have been installed), the jury's finding could have been supported in other respects as follows:

(1) That the crossing-tender, an agent of the petitioner within the meaning of the Federal Employer's Liability Act, was negligent (although not passed upon by the Court of Appeals, see *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U.S. 326);

(2) That the petitioner was negligent toward its employee, the respondent's testate, by its failure to supervise the crossing with its own experienced personnel;

(3) That, in addition to the findings of the jury on the special questions presented to it, the jury could have found other possible grounds on which to base its finding of unsafe-place-to-work (see *Arnold* v. *Panhandle & Santa Fe Railway Co.*, 353 U.S. 360).

Conclusion.

Since there is no case cited in the petition in conflict with the one at bar, and since there is substantial evidence to support the jury's finding, it is respectfully submitted that the Court of Appeals did not err and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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